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IN THE

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1977

No. 77-1662

NATIONAL BLACK MEDIA COALITION, *et al.*,

*Petitioners,*

v.

MIDWEST VIDEO CORPORATION, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS  
GILL CABLE, INC. AND  
WESTERN COMMUNICATIONS, INC.  
IN OPPOSITION

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**OPINIONS BELOW**

The opinion of the Court of Appeals is reported as *Midwest Video Corporation v. Federal Communications Commission*, 571 F.2d 1025 (8th Cir. 1978) (FCC App. A).<sup>1</sup> The court granted a stay of its mandate on April 4,

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<sup>1</sup>Throughout this brief, appendix references (FCC App.) are to the appendix submitted by the Federal Communications Commission in Case No. 77-1575, U.S. Sup. Ct., a petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit relating to the same decision below. The FCC appendix has been cited by the petitioner in Case No. 77-1662.

1978. (FCC App. D). The decision of the Federal Communications Commission is reported as *Cable TV Capacity and Access Requirements*, 59 F.C.C.2d 294 (1976), reconsideration denied, 62 F.C.C.2d 399 (1976). (FCC App. B and C).

### JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1254(1) and 28 U.S.C. §2350(a).

### STATUTES AND RULES INVOLVED

This case involves the jurisdiction of the Federal Communications Commission to promulgate changes in 47 C.F.R. §§ 76.252, 76.254 and 76.256. No statutory provisions sustain the action of the Federal Communications Commission. However, Petitioner relies upon 47 U.S.C. §§ 151, 152(a), 153(h), 303(g), 303(r) and 307(b) for authority (FCC App. E).

### COUNTERSTATEMENT

The court below set aside rules of the Federal Communications Commission promulgated in *Cable TV Capacity and Access Requirements*, 59 F.C.C. 2d 294 (1976) [1976 Report], amending and relaxing the agency's prevailing rules regarding access channel obligations<sup>2</sup> of cable television operators. In 1972, the Commission required that all cable systems in the top one hundred major television markets should provide, before March 31, 1977, the following: 1) a capacity of twenty program channels; 2) sufficient non-broadcast bandwidth for each broadcast channel; 3) technical capacity for non-voice return communications; 4) four non-broadcast

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<sup>2</sup>As used herein "access" refers to the use of cable television facilities by persons other than the owner or operator of the cable system.

channels, one each for public, educational, local government and leased channel use; 5) public access channels, the number of which was to be determined by demand; and 6) adequate facilities for production of access programming. *Cable Television Report and Order*, 36 F.C.C. 2d 143 (1972).

After recognizing that the technological and financial burdens of its rules on cable operators frequently were not justified by demand for the services, the Commission, within three years of issuing these rules, instituted a rule-making proceeding<sup>3</sup> which resulted in the report and order reviewed by the court below. The Commission's 1976 *Report* reflected a determination that the uncertain demand for access by the public did not justify the 1972 rules, which had the effect of increasing costs to subscribers. Consequently, the Commission amended its rules to require cable systems with 3500 or more subscribers to offer, as a minimum level of service, access for the four categories of uses and for general public access on but a single access channel. Greater access was required only if the system both had the capacity and experienced greater demand for more access use than it could accommodate on a single channel. The Commission also extended the deadline for cable systems to meet the twenty channel capacity requirement to June 21, 1986.

The 1976 *Report* refashioned the perspective of the access rules, applying them not to all major market cable systems but to any system with 3500 or more subscribers regardless of the size of the community served. Recognizing that the rules thus applied to only a portion of all cable systems, the Commission reaffirmed its earlier view that local franchising authorities could fix access require-

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<sup>3</sup>Docket No. 20508. *Cable Television Channel Capacity et al.*, 53 F.C.C. 2d 782 (1975).

ments no greater than those imposed by the Commission regardless of the number of subscribers. However, it accepted, for the first time, the principle that local authorities could impose access burdens greater than those set out in the new rules, regardless of the number of subscribers, "upon individual showings and with Commission approval". 59 F.C.C. 2d at 325 (FCC App. 163). On reconsideration of its report and order, the Commission reaffirmed that a local authority could impose greater access obligations on systems within its jurisdiction as long as the requirements could be justified by concrete cost data having a "rational relationship" to the anticipated benefits to cable subscribers. *Cable TV Capacity and Access Requirements*, 62 F.C.C. 2d 399, 402 (1976) (FCC App. 189).

Midwest Video Corporation filed a petition for review of the 1976 Report with the United States Court of Appeals for the Eighth Circuit on June 15, 1976. *Midwest Video Corporation v. Federal Communications Commission, et al.* (Case No. 76-1496). The American Civil Liberties Union filed a petition for review of the same order in the United States Court of Appeals for the District of Columbia Circuit on June 17, 1976. *American Civil Liberties Union v. Federal Communications Commission, et al.*, (Case No. 76-1549). The two cases were consolidated by an order of the United States Court of Appeals for the Eighth Circuit on October 21, 1976, and designated as Case Nos. 76-1496 and 76-1839. The decision of the court below was filed on February 21, 1978.

The Eighth Circuit set aside the 1976 rules relating to cable channel capacity, equipment and public access on the ground that the Commission had no statutory jurisdiction over these matters and, as a consequence, the agency had no power to promulgate the rules, either

initially or as amended in 1976. The court found that no provision of the Communications Act of 1934, as amended,<sup>4</sup> justified the Commission's exercise of regulatory authority over these aspects of cable operation.

In addition, the court held that the Commission had failed to demonstrate that the rules under review were "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting", the statutory scope of power over cable systems previously recognized by the United States Supreme Court. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968); *United States v. Midwest Video Corporation*, 406 U.S. 649 (1972). The court below examined the Commission's reasons for promulgating the access rules, reviewed the objectives of the rules and, applying the prevailing legal standard to the Commission's actions, concluded that "(t)he Commission has not shown the slightest nexus between the 1976 Report access rules and its responsibilities for broadcast television." 571 F.2d at 1038 (FCC App. 28). Without that nexus, the court determined, the access rules and the associated channel capacity and rebuild rules should be set aside.<sup>5</sup>

The court below issued a stay of mandate in the case on April 4, 1978. (FCC App. D). The petitioner in Case No. 77-1575, U.S. Sup. Ct., the Federal Communications Commission, filed its petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit on May 4, 1978. Two other petitions for writ of certiorari to

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<sup>4</sup> 47 U.S.C. §§ 151 *et seq.*

<sup>5</sup> Two of the three judges discussed constitutional aspects of the issues raised before the court, but they expressly declined to base their disposition of the case on those grounds. 571 F.2d at 1052 (FCC App. 64).

the Eighth Circuit arising out of the decision below were timely filed. *American Civil Liberties Union v. Federal Communications Commission, et al.*, Case No. 77-1648, (filed May 19, 1978), and *National Black Media Coalition et al. v. Midwest Video Corporation, et al.*, Case No. 77-1662 (filed May 22, 1978). Midwest Video Corporation has filed a brief in opposition to all three petitions for writ of certiorari and Respondents adopt the arguments made therein.

## REASONS FOR DENYING PETITION

### I. Constitutional Issues

In setting aside the Commission's mandatory channel capacity, equipment and access rules solely on jurisdictional grounds (FCC App. 91), a majority of the lower court stated (FCC App. 64, 74, 77) that it was "unnecessary to rest [its] decision on constitutional grounds", and specifically declined to do so (FCC App. 64). The Commission, in its earlier filed petition, has acknowledged (FCC Pet. 13) that the lower court opinion was not decided on constitutional grounds.

Should access to cable television be required in the future by non-federal regulation, the effect of such regulations may then be evaluated in constitutional terms. At that time, these constitutional issues will be properly before the Court. Therefore, denial of the petition for certiorari<sup>6</sup> is appropriate under the Court's long established policy of both not anticipating constitutional questions, *Liverpool, N.Y. & P.S.S. Co. v. Emigration Commissioners*, 113 U.S. 33 (1885); see generally, *Ashwander*

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<sup>6</sup> Petitions filed by the Federal Communications Commission (FCC 15-16) and the American Civil Liberties Union (ACLU 13-27) also assert that the lower court opinion involves important constitutional questions. The reasons discussed herein for denying certiorari apply equally to the arguments of all petitioners.

*v. Tennessee Valley Authority*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring), and declining to decide questions of a constitutional nature unnecessary to a decision in a case. *Alexander v. Louisiana*, 405 U.S. 625 (1972); *Burton v. United States*, 196 U.S. 283 (1905); *Ashwander* (Brandeis, J., concurring), *supra*.

## II. Congressional Action

More importantly, this case does not merit review by the Court because of current Congressional activity to re-write the Communications Act of 1934. On June 7, 1978, a complete revision of the Act was proposed by the Chairman of the House Communications Subcommittee. H.R. 13015, 124 Cong. Rec. H5231 (1978). Among other things, the bill proposes to completely eliminate federal regulation of cable television. Sec. 102(b)(1). Since 1968, in *United States v. Southwestern Cable Co.*, *supra*, and again in *United States v. Midwest Video Corp.*, *supra*, the Commission has relied upon this Court to establish its jurisdiction over various aspects of cable television through the vehicle of judicial construction. Now petitioner and the Commission appear once again before the Court seeking verification of an expansion of jurisdiction over additional matters involving cable television. The time has come for the Court to exercise restraint and permit Congress to establish a legislative policy in this area.

## III. Unified Regulation of Access

The decision below does not relate to an aspect of cable regulation where national uniformity of service is required, a factor considered by the court in *Southwestern* and *Midwest*, *supra*. There has been no showing that unified regulation in the access, channel capacity, and equipment areas is important. In fact, the Commis-

sion's actions in this area suggest that no such unified regulation is necessary. Thus, the Commission's rules, prior to the *1976 Report*, recognized the role of local franchising authorities in adopting channel capacity and access channel requirements in particular non-major markets not covered by the federal rule. In reaffirming its position that such local action continues to be important, the Commission stated its belief (FCC App. 161-62) that "room remains for local authorities to exercise their own best judgment in balancing between the needs of their citizens and the costs which must ultimately be borne by them". The *1976 Report* contemplated access requirements by local franchising authorities which could exceed Commission requirements upon individual showings and with Commission approval. Therefore, the overall perspective of the Commission's actions specifically recognizes that the unified regulation of access does not reach that degree of importance which justifies review by this Court.

### CONCLUSION

For the reasons set forth above and in the brief of Midwest Video Corporation, this case does not merit review by this Court. In particular, Congress should be afforded an opportunity to exercise its primary responsibility to define exactly what jurisdiction the Federal

Communications Commission shall have over cable television. It is respectfully submitted, therefore, that this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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